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August 20, 1997

Via Hand Delivery

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Docket No. 97-141

Dear Mr. Caton:

Transmitted herewith on behalf of The Network Affiliated Stations Alliance ("NASA"), a coalition of over 650 local television broadcast stations affiliated with the ABC, CBS and NBC Television Networks, are an original and nine (9) copies of NASA's Reply Comments for filing in the above-referenced docket.

If any questions should arise during the course of your consideration of these Reply Comments, it is respectfully requested that you communicate with the undersigned.

Very truly yours,

Wade H. Hargrove
Counsel to
The Network Affiliated Stations Alliance

WHH/rjd
Enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status	)	CS Docket No.
of Competition in the Markets for	)	97-141
the Delivery of Video Programming	)	

REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

* * * * * * * * * * * * *

Question: I still want to watch my local channels. Is that a problem if I have the DSS system?

Answer: No problem. With the touch of a button on your remote, you can switch over from the DSS system to your local stations. Ask your retailer to suggest the best indoor or outdoor antenna to receive your local channels. Recent technology has made antenna quality better than ever. And remember, with an antenna, you get your local channels for free.[1]

* * * * * * * * * * * * *

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August 20, 1997

[1]DirecTV promotional brochure. *See* Exhibit A.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status	)	CS Docket No. 97-141
of Competition in the Markets for	)	
the Delivery of Video Programming	)	

REPLY COMMENTS OF THE NETWORK AFFILIATED STATIONS ALLIANCE

The Network Affiliated Stations Alliance ("NASA") is a coalition of the ABC, CBS and NBC Television Affiliate Associations. NASA consists of over 650 local television stations throughout the nation that are affiliated either with the ABC, CBS or NBC broadcast networks.

These reply comments are addressed to various comments filed in response to the Commission's Notice of Inquiry ("Inquiry") in the above-captioned matter.

I.
Preliminary Statement

Two satellite carriers, DirecTV and PrimeTime 24, and their trade association, the Satellite Broadcasting and Communications Association of America ("SBCA"), (collectively, the "Satellite Carriers") have submitted comments arguing that competition in the delivery of video programming has been impaired by the compulsory copyright licensing provision of the Satellite Home Viewer Copyright Act (the "SHVA" or "Act").[2] The Satellite Carriers argue that the SHVA should be

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[2] 17 U.S.C. §119.

amended and harmonized with the compulsory copyright license for cable if meaningful competition between satellite carriers and broadcast stations[3] and between satellite carriers and cable systems is to exist.

The arguments made by the Satellite Carriers and the copyright law amendments they now propose should be rejected. The SHVA was never intended to foster competition between broadcast stations and satellite carriers. Indeed, the SHVA reflects a fundamental policy decision by Congress to prohibit competition between the free, local over-the-air delivery of broadcast network programming and the delivery of that same, duplicating programming by satellite on a paid subscription basis. Thus, any argument that the SHVA must be amended in order to foster competition between satellite carriers and broadcast stations demonstrates a fundamental misunderstanding of the Act and its purpose. Moreover, the amendments to the Act proposed by the Satellite Carriers to eliminate the Act's "white area" provisions will not enhance competition between satellite and cable providers, but rather, will eviscerate the Act and undermine the national network/local affiliate distribution system--a system that Congress has noted "has served the country well."[4]

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[3]Although the focus of the Commission's *Inquiry* in this proceeding does not appear to be the extent to which satellite carriers compete with broadcast stations, the Satellite Carriers and PrimeTime 24, in particular, direct much of their argument to that proposition. Accordingly, NASA is responding to the argument.

[4]H. Rept. 100-887, Part 2, on H.R. 2848 (The Satellite Home Viewer Copyright Act), 100th Cong., 2d Sess., at p. 20 (September 29, 1988).

Arguments by the Satellite Carriers that they cannot effectively compete without offering duplicating broadcast network programming are contradicted by the factual information contained in their Comments. DBS is a thriving industry. Satellite subscribership grew at the staggering rate of 84.5% in the twelve-month period from May 1996 and May 1997.[5] DirecTV, alone, added 1.05 million subscribers during that period.[6] SBCA notes that there are presently 7.356 million satellite subscribers and that subscribership grew at a rate of 6,088 per day in 1997, up from 4,932 per day in 1996 and 2,959 per day in 1995.[7] One industry analyst predicts, "[t]here's going to be some form of dish on probably 80% of the homes in America in 10 years, probably less."[8]

SBCA attributes the "sharp increase" in satellite subscribership to "the popularity and ease of availability of DBS."[9] SBCA acknowledges that satellite carriers offer their subscribers "more program diversity and choice than any other MVPD" and that satellite carriers provide "the highest quality video service available in the market today."[10] As a result, SBCA notes: "DBS is becoming

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[5]National Cable Television Association Comments at p. 7.

[6]*Id.*

[7]SBCA Comments at pp. 5-6.

[8]National Cable Television Association Comments at p. 7 (*citing The Dish on Satellite TV*, San Francisco Examiner and Chronicle, February 5, 1995).

[9]SBCA Comments at p. 5.

[10]*Id.* at p. 24.

increasingly the system of choice for consumers who want the programming and diversity at the competitive value that the service providers offer."[11]

DirecTV disclosed that some 43%--almost one-half--of its subscribers "were cable subscribers at the time they subscribed to DirecTV."[12] "[C]onsumer[ ] . . . acceptance of DBS as the designated competitor to cable has been born out by . . . subscriber data. . . ."[13]

Given the unqualified economic success the satellite industry is enjoying, it is difficult to understand exactly what the satellite carriers are complaining about. Their factually unsupported, conclusory claims that they are unable to compete cannot be reconciled with the factual economic data they have submitted in this proceeding.

The argument of the Satellite Carriers that their ability to compete is somehow impaired by the government's failure to provide them mandatory access to duplicating broadcast network programming is further belied by statements they are making to their subscribers and potential subscribers. Exhibit A, for example, contains a DirecTV and USSB advertising brochure that was circulated last month in a national magazine. The brochure contains questions and answers about satellite service--all of which are designed to demonstrate the ease with which satellite subscribers can access broadcast programming. Here's an example:

> Question: "I still want to watch my local channels. Is that a problem if I have the DSS system?"

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[11] *Id.* at p. 9.

[12] DirecTV Comments at p. 7.

[13] SBCA Comments at pp. 9-10.

Answer: "*No problem.* With the touch of a button on your remote, you can switch over from the DSS system to your local stations. Ask your retailer to suggest the best indoor or outdoor antenna to receive your local channels. Recent technology has made antenna quality better than ever. And remember, with an antenna, *you get your local channels for free.*" [Emphasis added.]

Exhibit B contains an advertisement by U.S. Satellite Broadcasting with the following statement:

> "Contrary to what you may have heard, the 18" DSS® system has always been fully compatible with local channels offering consumers a *seamless* way to enjoy their local programming." [Emphasis added.]

In short, DirecTV argues to the Commission, the Copyright Office and Congress, on the one hand, that without government imposed mandatory access to broadcast programming it is unable to compete, while, on the other hand, it is telling its subscribers that the "quality" of outdoor antennas is "better than ever" and that with the mere "touch of a button" the same programming can be obtained in "seamless" fashion from a local station "for free." The contradictions are self-evident. DirecTV is either misrepresenting the truth to the Commission, the Copyright Office and Congress--or to the public.

It is comical that the Satellite Carriers would argue--notwithstanding their ability to deliver *dozens, if not hundreds*, of channels of television programming to the *entire continental United States*--that they cannot effectively compete with local broadcast stations that can only offer a *single* channel of programming to an *area extending some 60 - 65 miles from their transmitters*.

The fact is, as noted earlier, Congress never intended for competition to exist between local broadcast stations and satellite carriers in the delivery of broadcast network programming. The Satellite Home Viewer Act provides satellite carriers with a compulsory copyright license to serve only those homes that *are not served* by a local network affiliated station. There are sound policy reasons underlying the limited scope of the satellite industry's compulsory license. Local broadcast stations deliver their programming for *free*--satellite carriers offer it on a *paid subscription* basis. Congress has gone to great lengths--both in the SHVA and the Cable Act of 1992--to protect viewer access to *universally free*, over-the-air broadcast network programs from *local* broadcast stations.

The real focus of the Commission's *Inquiry* in this proceeding is the extent and nature of competition between satellite carriers and other MVPD's, including cable television systems. The best evidence that the SHVA's "white area" restrictions have not impaired the satellite industry's ability to compete effectively with cable is reflected in DirecTV's candid acknowledgment that virtually *one-half (43%) of its subscribers are former cable subscribers!* Plainly, satellite carriers are having no difficulty competing with cable.

The Satellite Carriers argue that in order to compete, they must be afforded the same compulsory copyright license as cable. NASA disagrees. The Satellite Carriers fail to acknowledge that cable's compulsory copyright license is a direct product of and is linked inextricably to the Commission's (and more recently Congress') must carry and a host of other cable regulatory policy requirements.

The compulsory license established for cable in Section 111 of the 1976 Copyright Act is directly linked to communications regulatory policy. Section 111 was enacted following the FCC's

adoption of cable's must carry requirements, distant signal quotas, syndicated exclusivity, sports black-out and network non-duplication rules.[14] As the Copyright Office recently reported to Congress, cable's compulsory copyright license "represents an amalgamation of FCC communications policy and regulation, Supreme Court action, copyright policy compromises and legislative initiative."[15]

The House Report accompanying the 1976 Copyright Act emphasizes the linkage between communications policy and copyright laws:

> "[A]ny statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the cable television industry. While the Committee has carefully avoided including in the bill any provisions which would interfere with the FCC's rules or which might be characterized as affecting 'communications policy,' the Committee has been cognizant of the interplay between the copyright and communications elements of the legislation."[16]

The D.C. Circuit has observed:

> "[T]he 1976 Congress did not imagine copyright law and communications law to be two islands, separated by an impassable sea. Rather, Congress was aware of the interplay between copyright

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[14]Cable Television Report and Order, 36 FCC 2d 143 (1972).

[15]"The Cable and Satellite Carrier Compulsory License: An Overview and Analysis," A Report of The Register of Copyrights (March 1992) (hereinafter "Copyright Office Report").

[16]1976 Act House Report at p. 89.

> and communications law, and knew that the FCC would have a role to play in determining the scope of compulsory licensing."[17]

The interplay between copyright and communications policy is reflected in the terms of the compulsory license itself. Eligibility for the compulsory license to retransmit broadcast stations hinges on whether the FCC's rules permit carriage of the stations.[18] Similarly, whether a signal is local or distant for copyright purposes is determined by the area in which a commercial television station is entitled to must carry under the FCC's rules.[19] The close relationship between the compulsory license and communications policy was affirmed by Congress in its deliberations surrounding the 1992 Cable Act:

> "The ability of cable systems to retransmit local programming without copyright liability and without any responsibility to carry a complement of such signals on reasonable conditions is both unfair and inconsistent with the balance contemplated when the compulsory license was adopted."[20]

NASA believes it is neither necessary nor appropriate to harmonize the compulsory license for cable and satellite carriers and that the "white area" restrictions of Section 119 should not be modified. However, if Congress should decide to harmonize the compulsory copyright licenses for cable and satellite carriers, then Congress and the Commission, in fairness, must harmonize the

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[17] *United Video, Inc. v. FCC*, 890 F.2d 1173, 1184 (D.C. Cir. 1989).

[18] 17 U.S.C. §111(c)(2)(a).

[19] 17 U.S.C. §111(f).

[20] H. R. Rept. No. 92-628, 102d Cong., 2d Sess., at p. 63 (1992).

communications policy regulatory scheme for both industries. Accordingly, if cable's Section 111 compulsory license for carriage of local and distant broadcast stations is extended to satellite carriers, then satellite carriers must be required--as cable systems are--to carry *all* local broadcast stations and comply with the network non-duplication, syndicated exclusivity, sports black-out and other cable rules. Satellite carriers should not be permitted to "cherry pick" elements of the copyright law and avoid the corresponding communications policy regulatory requirements--requirements which were designed to serve a single public policy objective of protecting and preserving consumer access to *free, universally available, local* television broadcast service.

The argument made by the Satellite Carriers--couched in the guise of "competition"--is a "take it and use it if you want to" argument. As such, it is repugnant to the most fundamental notions of property rights, copyrights and fair dealing. The "competition" argument of the Satellite Carriers demonstrates a fundamental misconception of the Act, its legislative history and the public policy objectives it was designed to achieve.

In summary, Section 111 and Section 119 of the Copyright Act take into account and reflect the different physical characteristics of the cable and satellite industries. Those distinctions exist today to the same extent as they did when the two sections were adopted. An attempt to harmonize them would prove unduly complicated and would require sweeping changes in the Cable Act and the Commission's regulatory policy. The satellite industry has not made the case for any such change. Indeed, the industry's trade association expressly acknowledges that under the existing copyright and regulatory scheme satellite carriers now offer their subscribers "more program diversity and choice than any other MVPD." That is dispositive of the issue.

II.
History Of
The Satellite Home Viewer Copyright Act

The Satellite Home Viewer Copyright Act was adopted by Congress in 1988 to facilitate the delivery of broadcast network programming by satellite to dish owners who, because of distance or terrain, are unable to receive a signal of at least Grade B intensity from a local television station affiliated with that network. The Act had a dual purpose: (1) To enable households located beyond the reach of a local affiliate to obtain access to broadcast network programming by satellite and (2) to protect the existing national network/local affiliate distribution system.[21]

The Act created a limited statutory copyright--a "compulsory license"--authorizing satellite carriers to uplink a distant network station (without the station's consent and without having purchased the underlying copyrights in the station's programming) and retransmit the station by satellite to households located in areas ("white areas") that cannot receive the same network programming from a local affiliate. Congress contemplated that the delivery of duplicating network programming would be confined to a small number of households located largely in rural areas:

> "The bill will benefit 'rural America, where significant numbers of farm families are inadequately served by broadcast stations licensed by the Federal Communications Commission.'"[22]

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[21]H. Rept. 100-887, Part 1, *supra* at p. 8.

[22]*Id.* at p. 15.

"In essence, the statutory license for network signals applies in areas where the signals cannot be received via rooftop antenna or cable."[23]

* * *

"The Act provides a 'limited interim compulsory license' for the sole purpose of facilitating the transmission of each network's programming to 'white areas' which are unserved by that network."[24]

* * *

"The special statutory copyright for satellite service was created 'in recognition of the fact that a *small percentage* of television households cannot now receive a clear signal of the three national television networks.'"[25] [Emphasis added.]

* * *

"The statutory copyright 'will benefit rural America. . . .'"[26]

The FCC, in a rulemaking proceeding to implement the Act, noted that "while estimates vary, the consensus appears to be that 800,000 to 1 million households" are located in "white areas."[27] Both SBN (now PrimeTime 24) and Netlink put the numbers of unserved households at

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[23] *Id.*

[24] H. Rept. 100-887, Part 2, *supra* at p. 19.

[25] *Id.*

[26] H. Rept. 100-887, Part 1, *supra* at p. 15.

[27] In the Matter of Inquiry Into the Scrambling of Satellite Signals and Access to Those Signals by Owners of Home Satellite Dish Antennas Report, FCC Docket No. 86-336, 2 FCC Rcd 1669, 64 RR 2d 910, 922-23 (1987) at ¶64.

approximately 1 million.[28] In hearings before Congress, Ralph Oman, the then Register of Copyrights, agreed that the number of "white area" households affects only a "relatively small number of viewers. . . ."[29]

The Act represented a careful balance on the one hand between the interest of unserved households in securing access to broadcast network programming and a Congressional interest, on the other, in preserving the national network/local affiliate television program distribution system by protecting the copyright held by each affiliate for exhibition of its network programming. At the heart of the Act was an acknowledgment by Congress of the national interest in preserving the longstanding national network/local affiliate television partnership:

> "This television network-affiliate distribution system involves a unique combination of national and local elements, which has evolved over a period of decades. The network provides the advantages of program acquisition or production and the sale of advertising on a national scale, as well as the special advantages flowing from the fact that its service covers a wide range of programs throughout the broadcast day, which can be scheduled so as to maximize the attractiveness of the overall product. But while the network is typically the largest single supplier of nationally produced programming for its affiliates, the affiliate also decides which network programs are locally broadcast; produces local news and other programs of special interest to its local audience, and creates an overall program schedule containing network, local and syndicated programming."
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> * * *

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[28] *Id.* at n. 41.

[29] Statement of Ralph Oman, before the Subcommittee on Courts, Civil Liberties and the Administration of Justice, House Committee on the Judiciary, 100th Cong., January 27, 1988.

". . . [T]he network-affiliate partnership serves the broad public interest. It combines the efficiencies of national production, distribution and selling with a significant decentralization of control over the ultimate service to the public. It also provides a highly effective means whereby the special strengths of national and local program service support each other. This method of reconciling the values served by both centralization and decentralization in television broadcast service has served the country well."[30] [Emphasis supplied.]

* * *

". . . [T]he bill respects the network/affiliate relationship and promotes localism."[31]

* * *

"The Committee believes that this approach will satisfy the public interest in making available network programming in these (typically rural) areas, while also respecting the public interest in protecting the network-affiliate distribution system."[32]

Congress recognized that an important public interest distinction between the services offered by satellite carriers and those offered by local affiliates is that satellite broadcast services are available only to those who can afford to *pay* for them while broadcast services provided by local affiliates are *free* for everyone:

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[30]H. Rept. 100-887, Part 2, *supra* at p. 20.

[31]H. Rept. 100-887, Part 1, *supra* at p. 14.

[32]H. Rept. 100-887, Part 2, *supra* at pp. 19-20.

> "Free local over-the-air television stations continue to play an important role in providing the American people information and entertainment. The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely."[33]

Accordingly, the assurance of continued access by the public to the nation's *free, universal local* broadcast service was a core policy objective of the Satellite Home Viewer Act.

To enable local stations to monitor compliance by satellite carriers with the limitation of their copyright, the Act required satellite carriers to furnish broadcast networks, on a monthly basis, a list of the names and addresses, including zip codes, of their new subscribers along with a list of terminated subscribers. The networks aggregate these subscriber lists, along with a list of terminated subscribers, for each local television market and provide them to their local affiliates. Each affiliate reviews the lists, and if it believes a satellite carrier is violating the terms of its statutory copyright, the affiliate may either write a letter to the satellite carrier identifying subscribers the affiliate believes do not qualify for delivery of duplicating network programming and request that the carrier terminate broadcast network service to those subscribers or the affiliate may immediately file a copyright infringement action in federal court.

The Act established a three-part test for determining whether a household qualifies for satellite broadcast service under the statutory license:

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[33]H. Rept. 100-887, Part 2, *supra* at p. 26.

* The satellite dish must be used for "private home viewing"--thus, distant network stations may not be delivered to sports bars, lounges and restaurants,

* The receiving site must not be able to receive by the use of a conventional outdoor rooftop antenna a "measured" signal of at least Grade B intensity (as determined under FCC rules) from a local affiliate of the same network or from a translator carrying that affiliate, and

* The home must not have received by means of cable television a station affiliated with the same network within the 90-day period before satellite delivery of network service began.

Believing satellite carriers would follow the law and respect the limits of their statutory copyright, broadcasters did not object to the new favored copyright status for satellite carriers. Broadcasters assumed that satellite carriers would, in good faith, honor their commitment to Congress and comply with the limits of their copyright.

The Act was amended in 1994. Disputes between satellite carriers and local affiliates over the "white area" issue had become widespread and in an attempt to discourage satellite carriers from signing up illegal subscribers and local affiliates from making invalid challenges, the 1994 amendment added a "loser pays for the cost of measurement" provision. Under this provision, if a local broadcaster wrongfully challenges a subscriber, the broadcaster must reimburse the satellite carrier for any signal measurement costs the satellite carrier may have incurred. By the same token, if a satellite carrier wrongfully provides service to a home that does not qualify for the service, the satellite carrier must reimburse the local affiliate for any signal measurement costs the broadcaster may have incurred in measuring the signal at the subscriber's household. The 1994 amendment also

clarified that the burden of measurement and of proving whether a household can receive a Grade B signal from a local affiliate is on the satellite carrier--not the affiliate. And, for the first time, the Fox Network was covered by the Act.

III.
A History Of Noncompliance

Hardly had the ink dried on the 1988 Act when local broadcasters began to realize that satellite carriers were exceeding the limits of their compulsory license and infringing the copyright of local affiliates on a massive scale. The satellite carriers were marketing and selling distant broadcast network stations indiscriminately to dish owners who could easily receive the same network from a local affiliate. As a result, NASA initiated discussions with the satellite carriers shortly after the Act became law in the hope that a voluntary inter-industry compliance and enforcement program might be established. NASA continued its negotiations over a five-year period with all of the satellite carriers in anticipation that agreement might eventually be reached on a compliance and enforcement program. Those negotiations proved unsuccessful.

All the while, satellite carriers continued to market their broadcast network service--not as a "white area" supplemental service as Congress had envisioned--but rather as a broadcast network "time shifting" and "out-of-market" sports programming service. Exhibit C contains copies of PrimeTime 24's ads promoting "time shifting" of broadcast network programming and the availability of out-of-market sports programs--many of which may not legally be televised locally.

The business practices of PrimeTime 24 have been particularly egregious. PrimeTime 24 has made the following claims in its advertisements:

> "All the football you need is on PrimeTime 24 . . . over 100 games on PT East, PT West and Fox . . . the only place you can get all 10 playoff games . . . plus your favorite network programs from 7 major cities . . . PrimeTime 24--Your network and football connection."
>
> [PrimeTime 24 ad]
>
> * * *
>
> "Do your customers know they can get the networks on their DBS system?"
>
> [PrimeTime 24 ad]
>
> * * *
>
> "Don't miss out on a big DBS sale because you're unsure about the programming. Network television is a top programming concern with potential DBS dish customers, and now you can tell them with confidence that it's available to them if they qualify."
>
> [PrimeTime 24 ad]
>
> * * *
>
> "With PrimeTime 24's network affiliates, your DBS customers won't miss one minute of their favorite prime time programs, daytime soaps, evening news and seasonable sports on East and West Coast feeds."
>
> [PrimeTime 24 ad]

It is noteworthy that in all of the ads, disclosure of the statutory "white area" restriction is relegated to fine print which is hardly discernable without magnification. Consumers have been misled by countless advertisements like these and by the failure of satellite service providers and their agents and distributors to disclose fully and conspicuously the "white area" service restrictions. Thus, the SBCA's suggestion that broadcasters have treated consumers in a "cavalier" manner is laughable.[34] If satellite customers are frustrated, it is because the satellite carriers have knowingly misled them into signing up for unlawful service.

Having tolerated infringement of their copyrights for eight years and having spent some five years in fruitless negotiation with the satellite industry, the national broadcast networks and local network affiliates began last year to file infringement actions. Copyright infringement suits are now pending against PrimeTime 24 in Texas,[35] North Carolina [36] and Florida.[37] In the Florida action, a United States magistrate judge recently recommended that CBS's Motion for a Preliminary Injunction be granted and criticized PrimeTime 24 for its blatantly illegal marketing practices. The judge concluded:

> "[b]ased on the evidence presented thus far, it would appear that PrimeTime 24's entire marketing and sales efforts are based on the

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[34]SBCA Comments at p. 22.

[35]*Cannan Communications, Inc. v. PrimeTime 24 Joint Venture*, Case No. 2-96-CV-086, U.S.D.C.-Northern District Of Texas-Amarillo Division.

[36]*ABC, Inc. v. PrimeTime 24 Joint Venture*, Case No. 1:97CV00090, U.S.D.C.-Middle District Of North Carolina-Durham Division.

[37]*CBS Inc., et al. v. PrimeTime 24 Joint Venture*, Case No. 96-3650-CIV-Nesbitt, U.S.D.C.-Southern District Of Florida.

> premise that it will sell network programming to anyone who states that he or she does not receive an 'acceptable' picture over the air, without regard to whether the customer receives a Grade B intensity signal. PrimeTime 24 makes no attempt to determine the strength of the network signals received by its subscribers. . . ."[38]

Given the Magistrate's findings, the SBCA's claim that "[t]he legal actions mounted by the networks are counterproductive and simply exacerbate an already bad situation rather than attempt to improve it" is absurd.[39] These enforcement proceedings are legitimate attempts to enforce the copyright laws and put a stop to blatantly illegal practices.

In the summer of 1996, the National Association of Broadcasters initiated a new round of negotiations with the three satellite carriers in the hope, once again, that agreement might be reached on a voluntary inter-industry compliance and enforcement program. Two of the carriers, Netlink and PrimeStar, evidenced a willingness to negotiate in good faith and a compliance and enforcement agreement has, in principle, been reached with them. Under the agreement,

> * The parties will identify by zip code specific areas in each local market that, based on agreed upon engineering projections, are likely to receive a signal of Grade B intensity from each affiliate. Satellite service of broadcast network programming will not be provided to those areas without, first, securing permission from the local affiliate or conducting a signal measurement at the subscriber's household. (The goal is to resolve the reception issue to the fullest extent possible before, not after, satellite service

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[38]Report and Recommendation, June 2, 1997, *CBS Inc., et al. v. PrimeTime 24 Joint Venture*, Case No. 96-3650-CIV-Nesbitt, U.S.D.C.-Southern District Of Florida.

[39]SBCA Comments at p. 22.

begins--a process, it is hoped, that will eliminate viewer confusion and frustration.)

* In areas within each local market where engineering projections (again, projections agreed upon by the parties) indicate that a Grade B signal cannot be received from a local affiliate, satellite service may be authorized with the understanding that the affiliate reserves the right to object pursuant to the terms of the SHVA.

* A phase-out transition period will be provided for existing subscribers that do not qualify for broadcast network service.

* And finally, the parties have agreed that the appropriate viewing standard is the Act's Grade B standard and agreement has been reached on a measurement methodology for determining whether specific households can receive a Grade B signal.

The proposed industry agreement with Netlink and PrimeStar is evidence that, given a shared commitment, the existing Act and its "white area" restrictions can be implemented consistent with the original Congressional policy objectives.

IV.
The Dismantling Of The National Network/Local Affiliate Television Distribution System

The indiscriminate transmission by satellite of duplicating network programming from distant network stations will, if not checked, undermine the economic base of local network affiliates and, in time, dismantle the network/affiliate distribution system. The rates paid by local advertisers for local commercials--the rates paid by national advertisers for national commercials--and the

compensation paid to local affiliates by their networks are, all, a function of the size of each affiliate's local viewing audience. The correlation between a television station's viewing audience and its advertising revenue is direct and immediate. That the importation of duplicating programming will destroy the economic foundation of local broadcast service is a bedrock principle of federal communications regulatory policy. That policy is reflected in the FCC's longstanding network non-duplication and syndicated exclusivity rules for the cable television industry.[40] The Commission stated the economic consequences succinctly:

> "Diversion imposes economic harm on local broadcasters. . . . A drop of even a single rating point may represent a loss of 1/3 to 1/2 of a broadcaster's potential audience. Audience diversion translates directly into lost revenue for local broadcasters."[41]

The Satellite Carriers suggest that the SHVA must be amended to allow satellite carriers to compete more effectively. These arguments misconstrue the purpose and policy objectives of the Act. The Act was never intended to create competition between satellite carriers and broadcast stations. Its purpose was to give recognition to and protection of the copyrights broadcast companies obtain in an open market for network programming. The Act's prohibition against the unauthorized rebroadcast and resale of a network station's programming by satellite is the same public policy that

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[40]*See* 47 C.F.R. §§76.92 et. seq. and 76.1551 et. seq.

[41]Report And Order Re Amendment Of Parts 73 And 76 Of The Commission's Rules Relating To Program Exclusivity In The Cable And Broadcast Industries, 53 FR 27167, 64 RR 1818 (1988) at ¶41. Note: This Order contains an exhaustive discussion of the relationship between the cable compulsory license created by the Copyright Act of 1976 and the FCC's broadcast/cable television regulatory policy.

prohibits the unauthorized rebroadcast and resale of that programming by another broadcast station or cable television station. It is the same public policy that prohibits the unauthorized copying and resale of printed intellectual property. Thus, nothing less than the protection of fundamental rights against the wrongful taking of intellectual property and the preservation of the nation's *free*, universal, over-the-air broadcast service are at stake here.

The argument made by the Satellite Carriers--in the guise of "competition"--is a "take it and use it if you want to" argument. As such, it is repugnant to the most fundamental notions of property rights, copyrights and fair dealing. This argument demonstrates a fundamental misconception of the Act, its legislative history and the public policy objective it was designed to achieve.

V.
An "Objective" Vs. "Subjective" Legal Standard

The comments submitted by PrimeTime 24 consist for the most part of an attack on the Act's Grade B signal standard. PrimeTime 24 recommends that the Act be amended to replace the Grade B standard with a subjective picture quality standard.

In its comments, PrimeTime 24 presents no details as to how a subjective picture quality test would work. However, PrimeTime 24 has explained its subjective picture quality test in a written statement submitted to the United States Copyright Office.[42] In that statement, PrimeTime 24

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[42]Written Statement of Sid Amira, Chairman and CEO of PrimeTime 24, submitted before The Copyright Office, In Re The Revision Of The Cable and Satellite Compulsory Licenses, Docket No. 97-1.

recommended a process by which the subscriber would simply certify by "affidavit" that the household cannot receive through a conventional outdoor rooftop antenna a television picture that a "reasonable person would find acceptable."[43] If the affiliate challenged the subscriber, an independent "evaluator" approved by the satellite carrier and affiliate would produce a "snapshot" of the subscriber's television picture, provide the snapshot to the affiliate and satellite carrier and decide the issue. Under the "loser pays" concept, the evaluator's assessment would be paid for by the losing party.

PrimeTime 24's proposal raises more questions than it answers. First, what is meant by the term "affidavit"? Does PrimeTime 24 intend for the subscriber to submit a "sworn" affidavit or declaration? Would the subscriber have to visit a notary to have the affidavit or declaration notarized? Would the subscriber be subject to criminal penalties for perjury for false statements in the affidavit or declaration? If not, why have an affidavit or declaration? On the other hand, is it appropriate to criminalize this conduct? If not criminal sanctions, what sanctions would be appropriate for false statements made by a subscriber? Surely, some sanctions for false statements--money damages--would be necessary to reimburse affiliates for expenses incurred to validate the affidavit.

Moreover, what would the subscriber be asked to swear to or affirm? Would it be to swear to or affirm, as PrimeTime 24 seems to indicate, that the subscriber does not receive a picture that a "reasonable person" would find "acceptable"? If so, who is a "reasonable person"? What is an

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[43] *Id.*